STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TEG RF OWNER LLC d/b/a
RIVERFRONT TOWERS,

Plaintiff/Counter Defendant,

Case No: 18-015463-CB
Hon. Brian R. Sullivan

-vs-

GREAT NORTHERN INSURANCE
COMPANY,

Defendant/Counter Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on 8/8/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

Defendant filed a motion for summary disposition on plaintiff's counterclaim that there is no genuine issue of material fact that the parties did not have a pre-suit settlement. Defendant filed a similar motion on the same evidence alleging plaintiff had a pre-suit settlement with defendant.

The court grants plaintiff's motion and denies defendant's motion without prejudice. The court concludes because the terms of the release and settlement agreement were not

agreed upon by the parties, there was no settlement. The lack of mutual agreement as to the release precludes settlement.

FACTS

Defendant Great Northern Insurance Co. (Chubb) insured TEG RF Owner, LLC d/b/a Riverfront Towers' (Riverfront) building, comprised of residential condominiums and apartments, for property damage. On January 7, 2018 a sprinkler pipe burst in the building which caused extensive damage to the interior of the building.

Plaintiff initially submitted a claim for damages over $8,000,000.00 through its retained public adjuster, Brian Haden. Defendant made payments to plaintiff totaling $1,831,461.85 on that claim.

In September, 2018 the parties exchanged a series of e-mails. One e-mail included an offer by defendant to settle the claim for $4,000,000.00 with a total release of defendant by plaintiff. Plaintiff did not give defendant a copy of the release. On October 3, 2018 Haden responded by e-mail to Chubb that plaintiff would settle the claim for $5,000,000.00. Defendant responded with an offer of $4,000,000.00, minus payments to date (about $1,800,000.00) and a release. The terms of the release were again not provided.

On October 30, 2018 Haden e-mailed to defendant that plaintiff would accept

$4,750,000.00 with a global release. That proposal was rejected by the defendant. Haden then suggested $4,500,000.00 for a global settlement and release.

Defendant responded to plaintiff's e-mail on November 1, 2018. Defendant accepted the $4,500,000.00 global settlement with a release and stated:

> "per our agreement to resolve this claim on a global settlement basis "in the amount of $4.5M less monies already paid out totaling $1,831,461.85 for a final payment of $2,668,538.15 in exchange of an executed release, please see attached a settlement agreement I have executed. Please have an authorized representative of the insured sign and date the agreement and e-mail a copy of the executed agreement to me."

The release presented by Chubb included an indemnity provision, including reasonable and necessary fees incurred, and the release of a variety of parties listed in the release on a variety of terms.

Plaintiff refused to sign the release and did not negotiate the check for $4,500,000.00. Defendant claims those e-mail exchanges constitute a pre-suit settlement. Plaintiff denies it.

STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a party's claim. See *Maiden v Rozwood*, 461 Mich 109 (1999). The court must evaluate the motion by examining all documentary evidence presented to it

such as depositions, pleadings, affidavits, admissions and other evidence submitted by the parties. *Maiden, supra*; MCR 2.116(G)(B). The court must draw all reasonable inferences in favor of the non-moving party. The court must construe the facts in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. See *Dextrom v Wexford Company*, 287 Mich App 406 (2010); *Maiden v Rozwood*, 461 Mich 109, 120 (1999); *Rice v Auto Insurance Association*, 252 Mich App 25 (2002); *Ward v Franks Nursery and Crafts, Inc.*, 186 Mich App 120 (1990). The opposing party must submit evidence to establish a question of fact. It cannot rely on the allegations or denial contained in the pleadings if the opposing party fails to do so. Summary disposition is proper. See *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360 (1991). That is, if the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. See MCR 2.116(C)(10), (G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

Summary disposition is proper when the evidence fails to establish a genuine issue of material fact. In such a circumstance the moving party is entitled to a judgment as a matter of law. See *West v General Motors Corp.*, 469 Mich 177 (2003). A genuine issue of material fact exists when the record, giving the benefit of a reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds may disagree. *West, Id.*

A party's pledge to establish an issue of fact at trial cannot survive summary disposition under (C)(10). *Maiden*, 461 Mich at 121. The court rule requires the adverse party to set forth specific facts at the motion showing a genuine issue for trial. The reviewing court must evaluate the motion by considering the substantively admissible evidence proffered in support and opposition of the motion. *Maiden*, 461 Mich at 121; *McCart v J Walter Thompson USA, Inc.*, 437 Mich 109, 115, note 4 (1991).

DISCUSSION

The essence of defendant's claim is that the parties had a pre-suit settlement agreement. The parties agreed to a "global settlement" for $4,500,000.00 with a release. There seems to be no dispute that the $4,500,000.00 figure was a negotiated sum. However, the terms and conditions of the proposed release were never negotiated nor agreed upon. Defendant signed and sent a proposed release to plaintiff, an offer by defendant to plaintiff. The plaintiff did not sign that release. Therefore, there is no agreement. In order to have agreement there just be mutual assent or a meeting of the minds in all the essential elements of the agreement. See *Huntington National Bank v Daniel J. Aronoff Living Trust*, 305 Mich App 496 (2014). An enforceable contract does not exist if there are matters for future negotiation. See *State Bank of Standish v Curry, 442 Mich 76 (1993)*.

In *Reed v Citizens Insurance Company*, 198 Mich App 443 (1993) the court found

the parties had entered into a settlement (in suit). In *Reed* there was mutuality of assent, consideration on both sides of the agreement and the signed and returned offer. The court concluded a contract binding to both parties had been formed. In this case, unlike *Reed*, the plaintiff refused to sign the release, an integral part of the agreement, thus failing to fulfill an essential part of the settlement agreement.

The law covering a settlement agreement requires that the essential terms of the settlement be in writing or on the record. For the terms to be binding on plaintiff and defendant there must have been a global settlement, payment of $4,500,000.00 by defendant to plaintiff and a signed release. All three parts of the agreement needed to be satisfied and mutually agreed upon, including the release, a critical aspect of the agreement. The release was never signed nor its terms agreed upon. Without an agreement on the terms of the release by both parties there is no settlement. The terms of the settlement are governed by ordinary contract terms.

Minimal terms are sufficient to create a binding consent agreement. See *Mikonczyk v Detroit Newspapers, Inc.*, 238 Mich App 347 (1999). However, there is no evidence what was left undefined in the release was a mere formality or minor details. The parties agreed to enter into a release. The version of the release proposed by defendant was not accepted by plaintiff. The failure to agree to such a release, in the context of a major construction case, leads the court to the conclusion that the parties lacked mutuality of agreement on essential or material terms of the agreement. Therefore, there was no pre-

suit settlement this court can enforce. Plaintiff's motion to dismiss the case is granted without prejudice. The case is early in discovery and in the event additional information is discovered the defendant can always seek to reinstate and pursue the claim.

Plaintiff's motion for summary disposition under MCR 2.116(C) is granted and defendant's motion is denied without prejudice, as discovery is not completed; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 8/8/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: